

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Lena Sell
CASE NUMBER:	1505345
DIBP REFERENCE(S):	CLF2012/162691
MEMBER:	Mary Urquhart
DATE:	17 June 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 17 June 2016 at 1:26pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 March 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Ms Lena Sell applied for the visa on 8 August 2012 on the basis of her relationship with her sponsor, Mr Thomas Edward John Wetton. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because she was not satisfied that the applicant was in a genuine and continuing relationship with her sponsor and was not satisfied she met the definition of spouse or de facto partner under section 5F and 5CB of the Act, respectively.
4. On 27 May 2016, the Tribunal wrote to the applicant advising that the Tribunal had considered the material before it but was unable to make a favourable decision on the information alone. The applicant was invited to attend a hearing on 17 June 2016, at 11.00am. The hearing invitation also stated that if the applicant was not able to attend the hearing she should advise the Tribunal as soon as possible and that the Tribunal would only change this date if it was satisfied that there was a very good reason for adjourning the hearing. The hearing invitation also advised that if the applicant did not attend the scheduled hearing, the Tribunal may make a decision on the review without taking any further action to allow or enable her to appear before it.
5. On 17 June 2016 the applicant did not attend the hearing or contact the Tribunal to explain her failure to attend. In these circumstances, the Tribunal has decided, pursuant to s. 362B of the Act, to make its decision on the review without taking any further action to enable the applicant to appear before it.
6. No further information in support of her claims was given by the applicant in his application for review.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsoring partner.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application.

On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

10. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
11. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
12. The applicant claims to have met her sponsor in March 2011 when looking for a new housemate to share with. He moved in to share in April 2011. The couple claim to have commenced a relationship a few weeks later.
13. A copy of the delegate's decision was lodged with the application. No further material has been submitted.
14. The department file reveals that the applicant was interviewed on 12 December 2014 at which time the applicant stated that she and her sponsor had decided to live separately since July 2014 in order to save for a house. There is no evidence before the Tribunal in support of this claim. There is no evidence of savings, plans in relation to the joint purchase of a house or that the parties now live together and not separately and apart.
15. At interview the applicant claimed the parties keep their finances separate but share living expenses. No further information or supporting documentation in regard to financial pooling has been provided for the review. There is no evidence of the applicant demonstrating any knowledge of her sponsor's financial circumstances.
16. The applicant provided witness statements to the department in regard to social recognition. The Tribunal gives some weight to these as an indicator that the parties share the same social groups. However the Tribunal finds this evidence is not determinative of a genuine spousal relationship.
17. The Tribunal has considered whether there is credible evidence of commitment to the relationship before it. The evidence is that the parties have lived apart since July 2014 a period of almost two years. There is no evidence before the Tribunal that the parties intend to again live together or when this may happen if at all.
18. Based on an assessment of all the available evidence and information the Tribunal is unable to be satisfied that the applicant and her sponsor are in a genuine and continuing spousal relationship as required under ss.5F(2)(c) and 5CB(2)(b) of the Act. Furthermore the Tribunal is unable to be satisfied that the applicant and sponsor live together and not separately and apart on a permanent basis.
19. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
20. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

21. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Mary Urquhart
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in sub regulation (3).

- (3) The matters for sub regulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in sub regulation (2), the Minister may consider any of the circumstances mentioned in sub regulation (3).